

**11. An efficient bill-and-keep regime would allocate default financial responsibility for transport at the “edge of the network.”**

The defining characteristic of bill-and-keep is a default division of financial responsibility for the costs of handling traffic at some point between two interconnecting networks; in the absence of negotiation, each interconnecting carrier – whether it is an ILEC, CLEC, wireless provider, or IXC – must recover from its end users, and not from the other carrier, all network costs on its side of that point.” Qwest has called that point the “financial point of interconnection,” or “financial POI.” It is to be distinguished from the place where two networks actually interconnect, which Qwest has called the “physical POI.” As an example of the difference between these two points, the physical POI between an originating LEC and an IXC in a long-distance call is today the POP, but the financial POI is, in effect, the loop side of the end office switch, since the IXC bears financial responsibility for all costs from that point.

At bottom, two basic variables define the major differences among bill-and-keep proposals: (1) the mechanism for identifying financial POIs in each network, and (2) the mechanism for determining the placement and types of physical transport links between the two networks. These two variables are obviously related, as DeGraba’s proposal

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<sup>11</sup> Under current Commission regulations, each carrier is required to designate at least one physical POI in every LATA that it serves for the receipt of terminating traffic. The Commission should retain that approach under bill-and-keep and should clarify that, where a carrier makes only one physical POI available in a LATA, it is responsible for all network costs incurred on its side of the POI (*i.e.*, this designated physical POI also serves as the carrier’s financial POI). Although LATAs are the creatures of an obsolescent regulatory regime, they remain a readily available – if imperfect – means of dividing up the country for these purposes.

illustrates.<sup>12</sup> DeGraba would address the first issue (the designation of financial POIs) by requiring a carrier, in the absence of negotiations, to provide transport in any LEC-to-LEC call all the way to the end office serving the called party. Put another way, it would automatically place the financial POI for the call at that end office, and it would require the terminating carrier to recover from its own end users the costs of all “local access facilities” (*i.e.*, terminating switching and the loop) on its side of that point. The DeGraba proposal would then address the second issue (the deployment of efficient transport facilities between the two networks) by relying on negotiations against the backdrop of the specified default outcome. The premise of the DeGraba approach is that the very inefficiency of the default outcome – *i.e.*, each carrier’s obligation to provide transport to the other carrier’s end office over one-way transport facilities – would induce each carrier to negotiate an efficient, mutually advantageous transport solution, such as the use of two-way trunking.

In that respect, DeGraba’s designation of the end office as the default dividing line for financial responsibility would not result (and is not intended to result) in *physical* points of interconnection anywhere near the end office. It would, however, have quite significant effects on the relative bargaining power of the two interconnecting carriers. In particular, DeGraba’s approach would disadvantage those carriers that have fewer “end offices” than the carriers with which they must interconnect, because their transport burden under the DeGraba regime would be greater than that of the other carriers. That

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<sup>12</sup> “The DeGraba proposal” denotes the December 2000 white paper written by Patrick DeGraba and issued by the Office of Plans and Policy. *See* Patrick DeGraba, “Bill and Keep at the Central Office as the Efficient Interconnection Regime,” OPP Working Paper #33 (2000) (“*DeGraba*”).

fact presents significant competitive concerns, since ILECs typically have many more end offices in a given locale than do CLECs. Moreover, because DeGraba's default rule would require CLECs to obtain transport deep within an ILEC's network, it would generate calls for intrusive government intervention in an ILEC's provision of its transport facilities at regulated rates to help CLECs meet their transport obligation.

Those defects in DeGraba's approach – the asymmetry of obligations as between ILECs and CLECs, and the potential for undue regulation of transport within an ILEC's network – can be resolved by adopting a different approach to the placement of financial POIs. In Section III.A, below, Qwest proposes such an approach, under which financial responsibility would be allocated (by default) at the “edge” of an interconnecting carrier's network. In a circuit-switched ILEC network, that generally means the access tandem serving the called party's end office,

That default designation of financial POIs, however, is only a first step. The ultimate goal of any sensible transport solution is the creation of conditions under which any two carriers will make use of efficient transport arrangements – and, in particular, two-way trunks between their networks wherever justified by traffic volumes. Requiring interconnecting carriers to specify financial POIs for any given call does not *by itself* produce efficient two-way transport arrangements between the carriers' networks, because (among other considerations) the financial POI in carrier X's network for traffic flowing in one direction would seldom coincide with the financial POI in carrier Y's network for traffic flowing in the opposite direction. As discussed below, the question is whether, in the spirit of DeGraba, the Commission should rely on intercarrier

*negotiations* against the backdrop of financial POI default rules to produce efficient two-way trunking arrangements.

**A. The default dividing line for financial responsibility in the transport of telecommunications traffic should be drawn at the edge of the other carrier's network.**

There are several advantages to a default rule that designates the financial POI for a given call at the edge of the other carrier's network. The term "edge of the network," which is defined more precisely below for different types of networks, can be roughly described as the set of points within a carrier's network where interconnection with other networks is technically feasible and where it is efficient for that carrier to manage a high volume of traffic bound for, or originating from, end users distributed over a broad geographic area. The edge of a carrier's network is thus to be distinguished from points deep within a carrier's network architecture, such as an end office (in a hierarchical circuit-switched network) serving a small number of end users distributed over a confined area.

One key advantage of designating the financial POI at the edge of the network is that it would limit the number of points in an ILEC's network to which other carriers would have a financial obligation to transport traffic, and it would therefore remove the anticompetitive asymmetry (discussed above) inherent in the DeGraba approach. Moreover, by removing that asymmetry, it would ensure that each carrier has roughly equal incentives to negotiate efficient transport solutions (including the deployment of two-way trunks), since neither carrier would be systematically much worse off or much better off than the other in the event that negotiations break down. That would greatly alleviate any theoretical concern that ILECs might avoid good faith negotiations, and

make themselves slightly worse off in the short term, in the hope that, **by** making CLECs *much* worse off, they could drive them from the market altogether. *See* Rogerson Decl. 7-8. Finally, because a range of transport options is typically available for carriers that interconnect at the edge of others' networks, sparing an interconnecting carrier from **an** obligation to deliver traffic to multiple points deep within each network would significantly reduce the circumstances in which there would be calls for regulatory intervention in the rates that ILECs may charge an interconnecting carrier for transport using the ILEC's facilities. *See id.* at 17-18.<sup>13</sup>

To identify the "edge" of a carrier's network for purposes of dividing financial responsibility between interconnecting carriers, the Commission must first distinguish between two different types of network architecture. In the hierarchical circuit-switched architecture that characterizes the networks of the major ILECs, the "edge" is typically the location of a higher-order switch such as an access tandem. In a "flat" packet-switched architecture, by contrast, the "edge" could include any node in the local network where interconnection is technically feasible.

This distinction reflects the fundamentally different ways in which traffic is routed over these two types of networks. **As** the Internet backbone illustrates, hot potato routing – the delivery of a call to the closest technically feasible point on another carrier's

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<sup>13</sup> Because Qwest's approach would permit interconnection at the edge of an ILEC's network, it would significantly reduce and perhaps eliminate the circumstances in which an interconnecting carrier could be said to have been "impaired," under 47 U.S.C. § 251(d)(2), by the denial of access to an incumbent LEC's transport facilities at regulated rates. *See generally Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, Supplemental Order Clarification, 15 FCC Rcd 9587 ¶¶ 12-17 (2000) (noting context-specific character of "impairment" analysis under section 251(d)(2)).

network – is generally an efficient transport solution for a packet-switched network, because the individual packets constituting that call can follow any number of routes within that network to their final destination and, by definition, will not tie up a given “circuit.”<sup>14</sup> As observed in Qwest’s opening comments (at 30), however, it would not be similarly efficient to permit a carrier to drop a call off anywhere in a typical circuit-switched network, because such networks require both predictability of transmission paths and conservation of the available circuits occupied by circuit-switched traffic.

For these reasons, the dividing line of financial responsibility -- *i.e.*, the financial POI – should vary depending on whether a given network is circuit-switched or packet-switched. For packet-switched networks, the financial POI is appropriately placed at any technically feasible point, such as a gateway, within a defined geographic area. (As discussed in note 11, above, the relevant area is probably best defined, given current conventions, as a **LATA**.) The upshot of this approach is that, if carrier **A** drops off traffic at any given gateway on carrier **B**’s packet-switched network, carrier **B** must recover from its end users – and not carrier **A** – the costs it incurs in handling those calls on its side of that point.

The approach proposed here requires somewhat greater elaboration when applied to a traditional circuit-switched network. In that context, an appropriate financial POI is any point in the carrier’s network corresponding to the access tandem serving the called party’s end office (or, in the event the carrier has no such tandem, to the end office itself). For example, suppose that carrier **A** – which could be an **IXC**, a wireless carrier, or a

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<sup>14</sup> See generally Michael Kende, “The Digital Handshake: Connecting Internet Backbones,” OPP Working Paper #32 (2000).

LEC – drops off traffic at carrier B's access tandem at the edge of the latter's circuit-switched network, and suppose that carrier B's end user is served by an end office subtending that tandem. In that event, carrier B must recover from its end user, and not from carrier A, all costs associated with that traffic on its side of that point, including tandem switching, end office switching, and transport between the end office and the tandem. Now contrast the following situation: An ILEC has two access tandems – Tandem A and Tandem B – in a LATA. A CLEC wishes to interconnect with the ILEC *only* at Tandem B. Under the approach described here, the CLEC is free to choose that option, and it will pay none of the costs beyond its side of Tandem B for traffic to end users served by an end office subtending Tandem B. It will, however, bear financial responsibility for the additional network costs of delivering to Tandem A any traffic to end users served by an end office subtending Tandem A but not Tandem B. Because it would be generally inefficient to route such calls through two tandem switches, the originating carrier should receive appropriate price signals to deliver them to the tandem serving the relevant end office. Finally, it bears emphasizing that these outcomes are merely defaults; carriers are of course free to negotiate alternative allocations of financial responsibility if they wish.

**B. Carriers are likely to negotiate efficient two-way trunking solutions without extensive regulatory intervention beyond the designation of the financial POIs.**

An identification of financial POIs in a given carrier's network is a critical component of an efficient transport solution, but it does not complete the inquiry. Networks do not exactly coincide, and one carrier's financial POI for traffic moving in one direction will be separated – whether by a matter of inches or miles – from the other

carrier's financial POI for traffic moving in the other direction. Somehow that gap must be bridged, for otherwise – if they simply follow the default rules for financial POIs – carriers will deploy inefficient one-way trunks to other carriers' networks.

Before addressing whether regulatory specificity is needed to meet that objective, it is important to restate the efficient and desired outcome: the deployment of two-way trunks between the respective networks wherever justified by traffic volumes. Given the financial POI rules described above, detailed additional regulation may well be unnecessary to achieve that outcome. Any two carriers have a shared interest in reducing their aggregate costs by deploying a single, efficient two-way trunk, rather than two inefficient and redundant one-way trunks, for the traffic between their two networks. Of course, each carrier has an individual, self-interested incentive to avoid paying as much of the cost of that trunk as possible. But, given each carrier's background obligation to interconnect with other carriers, *see* 47 U.S.C. § 251(a)(1), and given that the default outcome is the construction (to the disadvantage of both carriers) of separate one-way trunks, each carrier would have a strong incentive to agree to share the costs of a single two-way trunk so long as *some* traffic flows in each direction between the two carriers.

Indeed, negotiations are more likely to succeed in producing efficient transport solutions under the approach proposed here than under the DeGraba proposal. Because carriers would be free to relinquish financial responsibility at the edge of another carrier's network, the default outcome would no longer disproportionately benefit carriers, such as large incumbent LECs, that have many end offices to which other carriers, such as CLECs, would bear the financial responsibility for delivering traffic. Qwest's approach would thus give ILECs added incentives to negotiate transport solutions in good faith,



because impasse would no longer make other carriers systematically worse off than ILECs. *See* Rogerson Decl. 7-8. In sum, designation of financial POIs at the edge of the network may well be enough to ensure fair and efficient two-way trunking solutions, without further regulation, for most intercarrier interconnection.

A significantly more interventionist option would be to promulgate detailed, nationally uniform regulations comprehensively establishing how networks must interconnect in specified circumstances, when two-way trunks should be required, how financial responsibility for those trunks should be allocated among the intercarrier carriers, how routing should be determined, and so forth. *See, e.g.,* AT&T Wireless Comments **42-44**. As in other contexts, however, it is far easier to add regulations incrementally once the need for them becomes apparent than it is to rescind regulations that, in hindsight, may not be strictly necessary. The Commission should thus adopt a market-oriented approach based on the placement of financial POIs at the edge of the network, study how well the market responds to the imperative for negotiation, and only then consider whether a more interventionist approach is necessary.

One context in which narrowly targeted regulatory intervention might arguably be necessary is where the traffic volume between carrier A's end office and carrier B's network is heavy enough to justify a direct trunk group that bypasses carrier A's tandem switch. **For** example, if that direct trunk group runs through the tandem location (and not through the tandem switch itself), it may be necessary to require carrier B to segregate the traffic destined for carrier A's high-volume end office so that it can be placed on the direct trunk group. The potential problem in such cases is that, if these direct-trunking disputes are viewed in isolation, carrier B may appear to have too small an incentive to

deviate from its default option of simply delivering all traffic on an unsegregated basis to the tandem switch. On the other hand, carriers normally negotiate a broad range of issues in combination, and it is unlikely that carrier B would permit negotiations to break down altogether, and thereby incur an obligation to underwrite the entire cost of inefficient one-way trunks, simply to avoid an efficient solution to direct trunking needs.<sup>15</sup>

**C. Appropriate implementation of bill-and-keep would eliminate concerns about ILEC discrimination against unaffiliated IXCs.**

AT&T (Comments 48-51) and WorldCom (Comments 24-27) express concern that bill-and-keep would increase an ILEC's ability to discriminate – with respect to both quality of service and pricing of local access – against unaffiliated IXCs in favor of the ILEC's own long-distance affiliate. That concern is misplaced. *See* Rogerson Decl. 21-24. Any ability of ILECs to engage in price or non-price discrimination is independent of the intercarrier compensation regime the Commission adopts. And any such ability can in any event be adequately addressed through regulations prohibiting such discrimination. *See id.* This is why the Commission has long imposed structural separation requirements

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<sup>15</sup> Many calls involve three carriers: the originating carrier, the terminating carrier, and a carrier that provides transport services in between. An IXC is a transport service provider that has an independent relationship with the calling party. It would be subject to the rules discussed in this section, and it would be responsible for recovering from its own subscribers all costs between the financial POI of the originating carrier and the financial POI of the terminating carrier. In contrast, a “transiting” carrier is a transport service provider that does *not* have an independent relationship with the calling or called party. Such a carrier essentially serves as a subcontractor to the originating carrier, helping the latter meet its responsibility to deliver calls to the terminating carrier's network. As discussed in Qwest's opening comments (at 25 n.14), a transiting carrier is entitled to be paid by the originating carrier for performing that service.

for non-BOC dominant LECs that offer long-distance services and why Congress added for BOCs the more specific safeguards set forth in 47 U.S.C. § 272(e).<sup>16</sup>

In challenging bill-and-keep on the ground that it would permit discrimination against stand-alone IXCs, therefore, AT&T and WorldCom attack a straw man: they appear to assume that, in transitioning to bill-and-keep, the Commission would overlook the need to retain appropriate safeguards against discrimination. Of course, the Commission would not overlook that need, and in any event the statutory safeguards set forth in section 272(e) would remain in force. To remove any doubt on this issue, the Commission should simply clarify that, under bill-and-keep, each ILEC (to the extent that it is dominant in the access market) must provide its end users with access to unaffiliated IXCs on the same terms, at the same rates, and with the same quality of service as the access it provides to its own IXC affiliate.

With respect to pricing, this means that, until it is deemed non-dominant in the provision of access services, an ILEC must have a standard menu of rates (which could be flat-rated or usage-sensitive or some combination of the two) for local services, and that menu cannot vary depending on an end user's choice of IXCs.<sup>17</sup> With respect to quality of service, this non-discrimination imperative means, among other things, that

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<sup>16</sup> The Commission recently sought comment on whether it should relax structural separation requirements for non-BOC ILECs. See *In the Matter of 2000 Biennial Regulatory Review, Separate Affiliate Requirements of Section 64.1903 of the Commission's Rules*, Notice of Proposed Rulemaking, CC Docket No. 00-175, FCC 01-261 (rel. Sept. 14, 2001).

<sup>17</sup> As AT&T appears to acknowledge (Comments 50), its concern about anticompetitive "price squeezes" by dominant LECs would be no more valid under a bill-and-keep regime than it is under the existing access charge regime. See Rogerson Decl. 24; see also *Southwestern Bell Tel. Co. v. FCC*, 153 F.3d 523, 548 (8<sup>th</sup> Cir. 1998) (affirming Commission determination that IXC price squeeze concerns "are unwarranted because adequate safeguards are in place to prevent such an occurrence").

each ILEC must agree to route any tandem-switched traffic bound for its own IXC affiliate through the same end office-to-tandem trunks that it uses to route tandem-switched traffic bound for an unaffiliated IXC. And, just as ILECs typically divert overflow access traffic from direct trunk groups onto tandem-switched transport facilities en route to any IXC, they should be required to ensure that those same facilities are available to handle overflow traffic from direct trunk groups destined for unaffiliated IXCs. *See* Rogerson Decl. 22.

**111. The adjustments bill-and-keep would require to end user rates and universal service are not “disadvantages” of bill-and-keep, but steps in the right direction.**

A number of carriers and states oppose bill-and-keep on the ground that it would increase end user rates, particularly the rates charged by the independent LECs operating in high-cost areas. *E.g.*, NTCA Comments **12-13**. Reduced to its essentials, this is simply an argument to postpone the day in which universal service subsidies will be explicit and competitively neutral rather than, as now, implicit and inefficient.

Although bill-and-keep would lead to rate increases for some services, it would also lead to at least commensurate rate reductions for other services. Today, consumers end up paying for access charges through higher IXC rates, and, as a group, they would do at least as well if those charges were imposed on them directly rather than, as now, indirectly through their IXCs. Put another way:

[S]hifting the recovery of [access] costs from carriers to end users should not, on average, increase the total costs faced by end users. This is so because carriers that currently pay inter-carrier charges, like long-distance carriers, pass these costs on to end-user customers in the form of higher rates. Thus, although a customer may see an increase in the bill he receives from his LEC, he should see a corresponding decrease in other charges, such as lower charges from his long-distance carrier.

DeGraba at ¶ 125. Indeed, for the reasons discussed above, a move to bill-and-keep for all traffic would produce significant gains for net consumer welfare. Bill-and-keep would reduce the significant costs of regulatory uncertainty and inefficient arbitrage, and a significant portion of those savings would be passed on to consumers in the form of lower retail rates within the telecommunications industry as a whole.<sup>18</sup>

The “consumer welfare” concerns raised about the application of bill-and-keep to access traffic are therefore not concerns about consumer welfare in the aggregate, which bill-and-keep could only enhance. Instead, the concern is that, as rates for most end users go down, rates for other end users would rise to meet the actual costs of serving them (in the absence of an explicit universal service response). That is because bill-and-keep would eliminate current implicit subsidy mechanisms that shield certain end users from bearing responsibility for the unusually high costs involved in connecting them to the network.

The existing access charge regime embodies two principal subsidy mechanisms. First, current access charges as a whole may exceed the aggregate costs of providing the specific access services with which they are associated, thereby permitting incumbent LECs to offer lower rates for basic local service.<sup>19</sup> Second, and more important in this

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<sup>18</sup> Although some critics suggest that consumers would find it hard to read their bills after a switch to bill-and-keep (*e.g.*, AT&T Comments 6, 33), those concerns are a sham. At worst, consumers would have to pay two separate sets of charges: those that cover the services offered by an end user’s LEC, and those that **cover the services offered by an** end user’s IXC. But that, of course, is the case today. The only difference is that certain costs that used to be associated with the IXC would now be associated with the LEC. There is nothing particularly “confusing” about that outcome, and in any event all carriers would have an incentive to find market-oriented ways to reduce any confusion.

<sup>19</sup> The ***CALLS Order*** purported to eliminate that implicit subsidy mechanism for price-cap LECs on the interstate side of the ledger. ***But see Texas Office & Pub. Util. Counsel,***

context, 47 U.S.C. § 254(g) requires an IXC – to the extent that it must pay access charges – to recover them not from the specific end users that cause them to be incurred, but from the IXC's national subscriber base. That national averaging requirement forces an IXC's end users in low-cost areas to pay significantly above-cost rates for conventional long-distance calls so that end users in high-cost areas may pay artificially low rates. Bill-and-keep would largely eliminate this subsidy mechanism because, by requiring each LEC to recover its network costs from its own end users, it would remove access charges from the scope of the costs that are subject to the national averaging requirement.

Although including access charges within the scope of that requirement may have made sense as a transitional measure in the wake of the 1996 Act, it would be inappropriate on two levels to rely on that mechanism as a long-term solution to universal service needs. First, it is implicit rather than explicit and, as such, is irreconcilable with the new universal service mandate of section 254. Second, the geographical averaging mechanism is not at all competitively neutral: it places the subsidy burden not on telecommunications providers as a whole, but on providers of a limited category of telecommunications services (conventional long-distance services). That, too, cuts against the grain of section 254, which emphasizes the twin needs, in a competitive marketplace, to make universal service mechanisms fully explicit and to spread the

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265 F.3d at 327-28 (vacating that portion of *CALLS Order*). Moving to bill-and-keep for access traffic would not by itself necessarily eliminate *this* form of implicit subsidy where it persists, because regulators could theoretically choose to retain the subsidy mechanism in the form of higher rates that ILECs charge end users directly (rather than indirectly through higher access rates charged to those end users' IXCs).

contribution obligation as broadly as possible among providers of telecommunications generally.

In short, the geographic averaging mechanism that bill-and-keep's opponents wish to preserve is an anachronism and should be eliminated. Qwest understands that, by eliminating that implicit subsidy mechanism, bill-and-keep would require a significant expansion of current universal service mechanisms. In particular, it would require appropriate increases in the level of explicit contributions to the universal service fund. But that, again, is the necessary by-product of the reforms required by section 254.

Along these lines, there is no merit to suggestions that, by moving to bill-and-keep for access traffic, the Commission would somehow *violate* section 254(g). *Cf.* Focal Comments 42. By its terms, that provision merely requires "providers of interexchange telecommunications services" to average their rates among their entire subscriber base; it does not require such providers to pay access charges to ILECs. Indeed, relieving IXCs of the need to subject access charges to that national averaging requirement is the only way to satisfy the larger emphasis in section 254 on explicit and competitively neutral funding mechanisms. If anything, therefore, bill-and-keep is more consistent than the current access charge regime with the universal service principles of section 254. A few parties also seek to revive the moribund argument that a separate subprovision within section 254 – 47 U.S.C. § 254(k) – must be interpreted to require IXCs, rather than end users, to bear the costs of access. That position, which has no foundation in either the letter or the objectives of section 254, **has** now been squarely rejected not just by the Commission, but also by two courts of appeals. *See Texas Office*

*cf. Pub. Util. Counsel*, 265 F.3d at 323-24; *Southwestern Bell*, 153 F.3d at 559. The Commission should reject it here as well.

Finally, adoption of bill-and-keep for interexchange traffic will require the recovery directly from end users of certain network costs that had previously been recovered indirectly from end users through access charges. The Commission should permit significant flexibility in the recovery of those costs. As discussed in Qwest's opening comments (and above), one of the principal benefits of bill-and-keep is that, for the first time, it would make it feasible to employ flat-rated recovery of the costs of terminating access where that is more efficient than recovery through usage-sensitive charges. Any decision to adopt bill-and-keep should be accompanied by sufficient flexibility in end user rates that those rate structure efficiencies can be achieved.<sup>20</sup>

#### **IV. The Commission has legal authority to impose bill-and-keep for most traffic.**

The parties' divergent interpretations of the statutory provisions addressing intercarrier compensation rates confirm that those provisions, like a number of other

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<sup>20</sup> Because adopting bill-and-keep for access traffic would require significant reform of existing subsidy mechanisms, it would be appropriate to solicit the views of the Joint Board, just as the Commission might wish to do in response to the Tenth Circuit's recent decision invalidating the Ninth Report and Order. *See generally* 47 U.S.C. §§ 254(a), 410(a). Nonetheless, to avoid undue delay, the Commission should enforce a strict timetable for the presentation of the Joint Board's report and recommendation. A Joint Board could also recommend any adjustments to the current separations rules that might be appropriate to accommodate bill-and-keep. *See* 47 U.S.C. § 410(c). Although NECA hints that bill-and-keep would require significant changes to those separations rules, it is unclear why that would be so. As NECA acknowledges, bill-and-keep addresses how **network** costs are recovered (*i.e.*, from end users or from other carriers), not how they are allocated between jurisdictions. *See* NECA Comments 13. Of course, this Commission and its state counterparts would need to continue ensuring that ILECs receive a compensatory rate of return on both the interstate and intrastate sides of the ledger. *See generally Smith v. Illinois Bell Tel. Co.*, 282 U.S. 133 (1930). But there is no apparent reason why, after adoption of bill-and-keep, that requirement could not be met within the existing separations regime.



provisions in the 1996 Act, “[are] in many important respects a model of ambiguity or indeed even self-contradiction.” *AT&T v. Iowa Utils. Bd.*, 525 U.S. 366, 397 (1999). In these circumstances, where there is no obvious way to reconcile the various strands in the statutory text, the result is a rule of considerable deference to the Commission. As the Supreme Court has observed, “Congress is well aware that the ambiguities it chooses to produce in a statute will be resolved by the implementing agency.” *Id.* The Commission has broad discretion to resolve those ambiguities to pursue what, in light of its institutional expertise, it concludes is in the public interest. *See id.*

**A. The Commission has authority to impose bill-and-keep for traffic covered by section 251(b)(5).**

Opponents of bill-and-keep mistakenly treat the language of section 252(d)(2) as though it reflected a deliberate congressional choice as between CPNP and bill-and-keep for particular categories of traffic. *E.g.*, AT&T Comments 36-41. That provision does no such thing; in particular, it nowhere limits the reach of the bill-and-keep savings clause to cases of balanced traffic.<sup>21</sup> Instead, Congress gave the FCC and the state commissions a choice: either to elect “arrangement[s] that waive mutual recovery (such as bill-and-keep arrangements)” or to elect a truly cost-based CPNP regime. *See* Qwest

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<sup>21</sup> AT&T contends (Comments 36) that section 252(d)(2)(B)(i) “clarifies that ‘arrangements that waive recovery (such as bill-and-keep arrangements)’ are permissible only ‘if they ‘afford the mutual recovery of costs through the offsetting of reciprocal obligations.’” The first of those statutory quotations by AT&T omits a word in the bill-and-keep savings clause: that clause explicitly preserves “arrangements that waive *mutual* recovery (such as bill-and-keep arrangements).” AT&T thus nonsensically contends that the savings clause preserves “arrangements that *waive* mutual recovery” of costs only if those arrangements also (impossibly) “*afford* the mutual recovery of costs.” 47 U.S.C. § 252(d)(2)(B)(i) (emphasis added). The Commission is entitled to assume that Congress meant to make sense, and any ambiguity in this statutory language should be resolved in favor of an appropriately robust construction of this savings clause.

Opening Comments 43. What section 252(d)(2) precludes is the imposition of a non-cost-based scheme of compelled payments between carriers. But section 252(d)(2) does not constrain the Commission's choice of bill-and-keep if it determines, as it should here, that it would better serve the public interest than a purportedly cost-based CPNP alternative.

In any event, even if the bill-and-keep savings clause were ignored, section 252(d)(2)(A), standing alone, would not preclude bill-and-keep arrangements, because at most it would require regulators to permit recovery of the "additional costs" of transport and termination. *See* Qwest Opening Comments 42. That specialized term is reasonably construed to limit any intercarrier payments to the short-term marginal costs (effectively zero) of transporting and terminating each call. *Id.* Contrary to WorldCom's suggestion (Comments 19), determining that the "additional costs" of transport and termination are zero for these purposes does not somehow imply that the *total element long run* incremental cost of switching and transport is zero for purposes of setting the rate that CLECs must pay when leasing an ILEC's network elements. TELRIC was adopted under a different statutory standard: the UNE cost standard of section 252(d)(1). The Commission's implementation of that provision in that context has no logical bearing on its authority to impose bill-and-keep as an appropriate intercarrier compensation mechanism.

Citing the Supreme Court's 1999 decision in *Iowa Utilities Board*, Focal suggests that, in adopting bill-and-keep for traffic covered by section 251(b)(5), the Commission would cross a perceived jurisdictional line dividing (1) the FCC's authority to issue general methodological rules from (2) the states' power to set particular rates. Focal

Comments 32-33; *see generally Iowa Utilities Bd.*, 525 U.S. at 384. This argument is without merit. Bill-and-keep is a methodology, not a “rate.” The Commission has no less authority to preclude intercarrier termination charges for all traffic than to preclude it for balanced traffic – or, for that matter, to preclude one carrier from charging another for the cost of originating a local call (as, indeed, it has already done, *see* 47 C.F.R. § 51.703(b)). More generally, the Supreme Court has made abundantly clear that the Commission has plenary authority to resolve broad methodological issues of national importance to the industry. The issue before the Commission here is as general and nationally significant as they come: whether the rationalized intercarrier compensation regime for the 21st century will be bill-and-keep or some version of **CPNP**. The Commission can and should resolve that issue in favor of bill-and-keep.

**B. The Commission has authority to adopt measures encouraging states to move towards bill-and-keep for intrastate access traffic.**

The Tenth Circuit recently held that, under sections 254(b)(3) and (b)(5), the Commission has not just an opportunity but an “obligat[ion]” to induce the states – by “carrot or . . . stick” – to do their part in ensuring comparable rates within their states.<sup>22</sup> The logic of the Tenth Circuit’s ruling strongly indicates that the Commission has a more general authority to give the states appropriate inducements to make the transition from irrational, implicit funding mechanisms to the rational, explicit mechanisms required by section 254. Indeed, the very cornerstone of section 254 is the principle that, on both the interstate and the intrastate sides of the ledger, universal service should be funded not **by** ILECs alone through geographic rate-averaging and other implicit subsidies, but by “[a]ll

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<sup>22</sup> *Qwest Corp. v. FCC*, 258 F.3d 1191, 1204 (10<sup>th</sup> Cir. 2001) (internal quotation marks omitted).

providers of telecommunications services” through “equitable and nondiscriminatory contribution[s]” to explicit subsidy mechanisms.<sup>23</sup> Just as the Commission must “develop mechanisms to induce adequate state action” to fulfill the comparable-rate objectives of subsections 254(b)(3) and (b)(5),<sup>24</sup> so too must the Commission adopt mechanisms to induce state compliance with the core objective of subsections 254(b)(4), (e), and (f): a comprehensive transition by the FCC and the states to explicit, competitively neutral universal service programs.

Qwest therefore agrees with SBC (Comments 33-43) that the Commission can and should condition receipt of federal universal service funding on a state’s willingness, over time, to remove all implicit subsidies from its intrastate access charges and to convert them into explicit intrastate funding mechanisms. That carrot is likely to be highly effective, since the federal fund will play a critical new role in replacing **the** implicit subsidies that section 254(g) now produces under the existing access charge regime and that the adoption of bill-and-keep would sensibly eliminate. Once the states transition away from those implicit subsidies, any residual attraction of retaining the existing intrastate access charge regime would be highly attenuated, because that regime could no longer be used as a competitively skewed source of funding for universal service. The way would then be cleared for the Commission to lead a national regulatory consensus in support of bill-and-keep.

Finally, even if some states were reluctant to adopt bill-and-keep, such that conventional access charges accompanied intrastate but not interstate access traffic, that

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<sup>23</sup> 47 U.S.C. § 254(b)(4); *see also* 47 U.S.C. §§ 254(e) & (f).

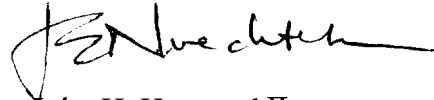
<sup>24</sup> *Qwest Corp.*, 258 F.3d at 1204.

reluctance would increasingly lead carriers to route traffic through digital networks (such as the Internet) in which “the interstate and intrastate components [of the traffic] cannot be reliably separated” – and that are thus categorically subject to the Commission’s section 201 authority to impose bill-and-keep. *See ISP Reciprocal Compensation Order* ¶ 52. As discussed in Qwest’s opening comments (at 46-47), and as also observed by SBC (Comments 42-43), that inevitable consequence of digital technology would make alternatives to bill-and-keep unsustainable in any jurisdiction over the long term.

### CONCLUSION

For the reasons set forth here and in Qwest’s opening comments, the Commission should adopt bill-and-keep for all traffic to the fullest extent of its jurisdiction.

Respectfully submitted,



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